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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
HER MAJESTY THE QUEEN	Martin Minuk, Jessica Arnett-Sandhu and Douglas Ripley for the Crown
- and -	
RICHARD NORMAN DOW, Accused.	Sarah Inness, Greg Gudelot and Crystal Antila for the Accused
	Judgment delivered: September 13, 2012

MARTIN, J.

I. INTRODUCTION

[1] At the start of his trial, Mr. Dow pled guilty to 11 counts of sexual assault and one count of simple assault from August 2001 to May 2005 involving 12 female complainants. Fifteen other charges involving seven other complainants were stayed. None of the assaults fall within the criteria of a "major" sexual assault. None involve digital, genital, or oral penetration or violence or the threat of violence. All of the assaults involve isolated touching of breasts, inner

thighs, buttocks, or vaginas of young women Mr. Dow dealt with through his part-time occupation as a fashion/model photographer-agent. His primary occupation then was a police officer.

[2] The issue before me can be simply stated: what is a fit, or just, and appropriate sentence for this offender for these offences? The Crown asserts that Mr. Dow should receive a penitentiary jail sentence of five years, while the defence asserts that a Conditional Sentence Order ("CSO") of less than two years, to be served in the community, is appropriate.

II. FACTS

[3] In about early 2000, Mr. Dow turned his photography hobby into a part-time vocation and actively began a fashion/model photography-agent business that he operated, over time, in various places in Winnipeg. His primary occupation then was as a police officer since 1988, about 12 years. He was a 47-year-old single father of a young girl. He has a grade 12 education, has attended university, and had a good employment history. The first offence arose in August 2001.

[4] The essential facts of the offences are set out below. For ease of reference, I have ordered them chronologically:

> Count 20: Sometime in 1999 Mr. Dow met 21-year-old JP in a nightclub. Later she contacted him and he did several photo shoots of her, all without incident. However, in August 2001 while driving JP to a restaurant after a late-night promotional event in a nightclub, Mr. Dow

reached over and touched JP's inner thigh and moved his hand up to her bare vagina. She pushed his hand away. He tried again but stopped when she told him to.

Count 22: 18 year-old KM-C contacted Mr. Dow to have him do several photo shoots. During the second shoot, in about January or February 2002, in order to enhance topless pictures, she consented to having Mr. Dow rub oil on her arms and collarbone. While applying the oil, Mr. Dow posed her face down on a bed and touched her breasts, moved his hands up her inner thigh, and placed her underwear between her labia.

Count 10: After meeting Mr. Dow in a bar, 19-year-old AC contacted Mr. Dow to do a photo shoot that then took place between the end of June 2002 and October 31, 2002. With her consent he applied oil to her body for topless photographs, but without her consent he touched her breasts with his hands.

Count 13: 18-year-old GC contacted Mr. Dow for a photo shoot. She went to his home studio twice between April 1 and May 7, 2003. During the second occasion, she agreed to Mr. Dow's suggestion to do nude shots. After a while she complained of shoulder stiffness. Mr. Dow offered to give her a massage and she agreed. Mr. Dow straddled her back while she lay on her stomach. Mr. Dow massaged her as agreed but, without consent, began to massage her buttocks and legs and

touched her breasts. GC felt helpless and frozen with fear. Nothing further occurred.

Count 19: Mr. Dow gave 19-year-old SH his business card when she waited on him in a restaurant. She contacted him in May 2003 for a photo shoot. During the shoot, Mr. Dow suggested she do nude photographs. She agreed and, while nude, Mr. Dow touched her breasts, inner thighs, and buttocks without her consent.

Count 4: Between December, 2003 and March 31, 2004, 17-year-old AN had Mr. Dow take photos of her. On one occasion, Mr. Dow reached around her from behind and began to fold her top from the bottom upward, directly placing his hands on her bare breasts, feeling them in a moving motion and touching her nipples.

Count 24: 20-year-old KW contacted Mr. Dow for a photo shoot. At the shoot in April 2004, KW was rolling up her tank top to expose the bottom of her breasts when, under the pretense of assisting her, Mr. Dow touched her breasts.

Count 3: 18-year-old CM contacted Mr. Dow and then went to his residence with her mother for a photo shoot once between September and November 2004. Mr. Dow suggested her mother leave which she did. He suggested CM do topless shots and she agreed. Then Mr. Dow twice approached her from behind and placed his hands directly on her bare

breasts, cupping them with his hands, pushing her breasts together and touching her nipples.

Count 26: Mr. Dow approached 18-year-old HG when she was working as a waitress. Later, she contacted him to set up photo shoots. During the second session in September 2004, at Mr. Dow's suggestion, HG removed her clothing for pictures that could be used in a men's magazine. She agreed to him rubbing oil on her body, as he said it would enhance the pictures. He rubbed oil on her arms, breasts, inner thighs, and vagina without her consent. She was frozen with fear.

Count 27: 23-year-old AO contacted Mr. Dow about a photo shoot. During the course of the photo shoot, between December 2004 and January 2005, Mr. Dow approached from behind and without warning, under the pretense of showing AO how to hold her shirt to push up her breasts to enhance the cleavage, he took hold of both her breasts with his hands.

Count 11: 17-year-old DE contacted Mr. Dow for a photo shoot. During the second shoot between January and March 2005, while posing with a baseball bat or hockey stick above her head, Mr. Dow approached her to make an adjustment and touched her chest.

Count 6: Mr. Dow approached 19-year-old ED in a shopping mall, saying he was an agent and that she fit "the look" he wanted. She was with her mother and he told her that ED would be safe with him because

> he also was a police officer. Thereafter he did a number of photo shoots with ED without incident. Ultimately, while alone with ED during a shoot in May 2005, he told her he wanted her bikini top tighter. She was concerned because of breast surgery she recently had. Instead of tightening the bikini string around her neck, he undid it, causing the bikini panels to fall and expose her breasts. He then fully placed his hand on her right breast and squeezed it.

To be clear, all of the sexual touching of these complainants was without their consent, although the circumstance surrounding the touching was consensual. In sum, these 11 sexual assaults and one simple assault (Count 11) happened over a 3½ year time span between August 2001 and May 2005 and involved two 17-year-old complainants, seven complainants between ages 18 and 19, and three complainants in their early 20's. Occasionally Mr. Dow offered alcohol during the photo shoots.

[5] During that time and up until Mr. Dow was charged in 2006, he continued operating and growing his photography business while maintaining his career as a police officer. By his account, the business was flourishing and he photographed and was agent for many young women and other people, both male and female. He reports that his business was represented by clients in over 50 movies, videos or television spots. The business appeared to satisfy his professional, financial and personal interests.

[6] In about 2006, due to a complaint, the police began investigating his business. Ultimately, in about September 2006 Mr. Dow was charged with a series of offences and then a second set in January 2007. He was released on minimal bail conditions and was suspended without pay from his police work. Subsequently he retired from the police force in order to obtain his modest pension. He had been a police officer for almost 19 years by then. As would be expected, his fashion/model photography-agent business closed and the case has garnered significant media attention. He has also lost contact with his daughter. For reasons largely beyond Mr. Dow's control, these matters took approximately 67 months from initial arrest to get to trial and plea (for details see ***R. v. Dow***, 2012 MBQB 122, 278 Man.R. (2d) 279). Thus, I am sentencing him today for offences that he committed between seven and 11 years ago. He is now 58 years old.

[7] As part of the sentencing materials, I was provided with a psychologist's report (Exhibit S16). It is thorough and detailed. It concludes at page 11:

> In summary, evaluation of Mr. Dow's reported history and clinical presentation was conducted to estimate his risk for sexual offending in the future. Both actuarial and clinical perspectives suggest that Mr. Dow is at a low risk of offending sexually against persons in the future. He has no history of criminal offending outside of the index matters. He presents without significant mental health issues that would otherwise render him more impulsive or which would compromise his judgment with respect to his conduct around others. He has limited but strong personal (family and peer) supports in the community. Despite the nature of his charges, he presents without compelling evidence of his being habitually sexually deviant in his behaviour or unable to suppress impulsive behaviour. With a positive upbringing, absent abuse or trauma, his adult lifestyle has been, for the most part, conventional and, as a police officer, highly pro-social.

III. POSITIONS

[8] Altogether, the Crown and the defence submitted over 30 sentence precedents. I have reviewed them all but will refer to only some. Most are clearly distinguishable. In the end, informed by precedent, it is for me to weigh and balance the specific factors and circumstances of this case and this offender in order to reach a just and appropriate sentence.

The Crown

[9] The Crown asserts that a five-year penitentiary sentence is required to address the gravity of the situation and principles of denunciation, retribution and deterrence. They say that Mr. Dow's actions in suggesting or taking semi-nude photos of some complainants, and the touching, speak to his bad character. Further, despite these offences not being classified as "major" sexual assaults, they nonetheless are serious and warrant a harsh penalty because of the number of offences, the time span, the age of the victims, and that special denunciation is required because he was a police officer (even though none of these offences took place while he was on duty). The Crown argues that these offences fall within the sphere of position-of-trust type offences. Finally, the Crown concedes that they are unable to find a sentencing precedent, for a similar series of offences, that supports their position of five years in jail as a just sentence.

The Defence

[10] The defence acknowledges the serious nature of these offences but, nonetheless, stress that the circumstances surrounding the individual touching demonstrate the relatively minor nature of these assaults compared to, for example, a stranger rape scenario (which is captured by the same wording and provisions of the ***Criminal Code***, R.S.C. 1985, c. C-46). In submitting that Mr. Dow ought to be given a two-year-less-a-day CSO, they point to comments of the Supreme Court of Canada in ***R. v. Proulx***, 2000 SCC 5, [2000] 1 S.C.R. 61 (QL) that a CSO is a form of incarceration and addresses denunciation and deterrence concerns. Further, the offences are old, he has not re-offended since his arrest, he has been publicly shamed and humiliated by extraordinary media attention to his case and, additionally, he has been financially and professionally ruined. They rely on a number of precedents, albeit none exactly on point. Finally, if I reject a CSO, then they argue a jail sentence of 15 months is appropriate.

IV. ANALYSIS

Approach to Sentencing

[11] A sentence imposed by a judge on an accused for a serious crime should be tailor-made, in the sense that, mindful of principles of sentencing, it responds appropriately to the circumstances of the offence and the particulars of the offender. The ***Criminal Code*** articulates that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a safe,

peaceful society through just sanctions that denounce unlawful conduct; deter persons from committing offences; separate offenders from society, where necessary; assist in rehabilitation; provide reparation; and promote a sense of responsibility in offenders. The ***Criminal Code*** mandates that a judge consider a number of principles as set out in s. 718.1 (a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender) and s. 718.2. Added to this statutory list are a number of common law principles that have developed over many decades of jurisprudence from commonwealth countries. For the sake of completeness, I note that while the statutorily-mandated aggravating factor for abusing a child or person under the age of 18 did not come into effect until after these offences, nonetheless the young age and vulnerability of a victim is a relevant sentencing factor here.

[12] Complicating my analysis is the number of offences to which Mr. Dow pled guilty. The proper approach in sentencing for multiple offences has most recently been reiterated by Steel J.A., as a summary guideline, at paragraph 33 in ***R. v. P.K.***, 2012 MBCA 69, [2012] M.J. No. 234 (QL) (albeit as part of a dissenting judgment but on other grounds):

> 33. So, in the case of multiple offences we now ask sentencing judges to:
>
> > 1) First determine whether any or all of the sentences are to be served concurrently or consecutively or a combination of both.
> >
> > 2) If treated as concurrent, then, although all circumstances of the offender and the offence must be taken into account in arriving at a sentence, the final sentence for multiple concurrent offences should, absent exceptional circumstances, be higher than the sentence that the judge would have awarded that offender for

> one count of that offence. This has come to be known as the "no free ride principle."
>
> 3) If treated as consecutive offences, after assigning a sentence to each offence, the judge must take one last look at the total cumulative length of the sentence with a view to determining whether the total sentence is so high as to be a "crushing punishment" on this offender. This is often referred to as the totality principle. It must be remembered that the totality principle considerations under s. 718.2(c) of the *Criminal Code* apply only when consecutive sentences are imposed. When a judge sentences an accused to concurrent sentences, no such considerations arise.
>
> 4) If the judge is of the view that the overall sentence is too high, it is within their discretion to reduce the sentence by using a variety of techniques. One of those techniques is to make some of the multiple offences concurrent to each other. This use of the concurrency principle is for the sole purpose of reducing an excessive sentence as a result of that "last look."

[13] As to step one, whether a sentence should be concurrent, consecutive, or a combination of both, MacInnes J.A. explained in ***R. v. Wozny***, 2010 MBCA 115, 262 Man.R. (2d) 75:

> 45. ... This question and the decision does not relate to the overall length of sentence. Rather, they pertain to the nature and circumstances of the criminal activity under consideration and the connectedness of two or more offences to each other. As Steel J.A. wrote in *Maroti* (at para. 22):
>
> > First, the courts use a multitude of phrases to express the same concept. See, for example, Ruby et al. [*Sentencing*, 7th ed. (Markham: LexisNexis Canada Inc., 2008)], at para. 14.10 - " 'a break in the transaction'; 'really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent'; 'one multi-faceted course of criminal conduct'; 'one transaction'; 'part of the same transaction or endeavour'; 'closely linked together'; 'one continuous criminal act'; 'one single enterprise'; 'single criminal adventure'; and 'reasonably close nexus' ". Although different courts have at different times used each of these phrases, I believe that they were all attempting to answer the same question - Is the connection between two offences sufficiently close

> to order the sentences imposed to be served concurrently as opposed to consecutively?
>
> 46. While this is often not a simple issue to decide, the general rule is that if the offences are sufficiently interrelated to form part of one single, continuous criminal transaction, a concurrent sentence is called for. However, if the offences are separate and distinct, then a consecutive sentence is to be imposed. Many of the aforementioned cases (*Grant*, *Golden*, *Draper*, and *Maroti*) make this clear. But this is only the general or basic rule.

Most often, this issue arises in the context of an allegation of a spree of crimes or crimes which are fairly readily observable to be interconnected, such as sexual offences against the same victim or perhaps relatively contemporaneous offences connected by an underlying cause or motive such as addiction or mental illness.

[14] Finally, I note the Supreme Court of Canada's direction in ***Proulx,*** as summarized at paragraph 127.4:

> 4. The requirement in s. 742.1(*a*) that the judge impose a sentence of imprisonment of less than two years does not require the judge to first impose a sentence of imprisonment of a fixed duration before considering whether that sentence can be served in the community. Although this approach is suggested by the text of s. 742.1(*a*), it is unrealistic and could lead to unfit sentences in some cases. Instead, a purposive interpretation of s. 742.1(*a*) should be adopted. In a preliminary determination, the sentencing judge should reject a penitentiary term and probationary measures as inappropriate. Having determined that the appropriate range of sentence is a term of imprisonment of less than two years, the judge should then consider whether it is appropriate for the offender to serve his or her sentence in the community.

As explained in Clayton C. Ruby et al, ***Sentencing***, 7th ed. (LexisNexis Canada Inc., 2008) at §15.18, the court rejected a rigid two-stage approach because:

> ... First, the Court held that the rigid two-stage approach did not correspond to the reality of the sentencing process, where in practice the term of imprisonment is necessarily entwined with the decision of where the offender will serve the sentence. Second, the rigid two-stage approach would create a paradox. A judge could determine that a sentence of less than two years was sufficient if served in custody but would then be insufficient if served in the community; however, the judge

> would be bound to allow a conditional sentence if the offender deserved a sentence of less than two years (on the first stage) and met the criteria for a conditional sentence (on the second stage). This could well lead to a lack of proportionality between offenders being sentenced for similar offenses. Third, a purposive interpretation of section 742.1 reveals that Parliament intended to give judges a flexible tool for allowing conditional sentences after considering all relevant factors and did not intend to impose a rigid analytical structure. A flexible two-stage analysis is therefore to be employed.

Thus at this point, assuming there is no statutory prohibition to granting a CSO, I should determine the appropriate range for this offender and these offences, not the specific sentence. If the range includes neither probation nor a penitentiary sentence, then I should consider whether I am satisfied that a conditional sentence would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 (see s. 742.1 of the ***Code***).

Aggravating and Mitigating Factors

[15] I start by consideration of aggravating and mitigating factors. The aggravating factors include:

- that the series of offences is comprised of 12 individual offences over a relatively lengthy period of 3½ years;
- the young age of the victims, especially as Mr. Dow was about 47 to 51 years old during the relevant time frame;
- the vulnerability of the victims who were alone with Mr. Dow in what should have been a safe, professional setting;

- that his actions demonstrated a clear disregard of the privacy and personal dignity of the victims. His offensive touching was humiliating and demeaning;
- that he knew the victims engaged him to help forge a career in fashion, modelling or entertainment;
- that he caused psychological harm to some victims;
- that his expression of remorse and responsibility is tempered by minimizing his offending behaviour; and
- Mr. Dow was a police officer who clearly ought to have known better.

[16] However, I do not find that Mr. Dow was in a position of trust to these victims and as such do not consider that to be an aggravating factor. I do not accept the Crown's position that Mr. Dow's ability to make some complainants comfortable enough to allow him to take nude or semi-nude photographs or the nature of all of the photographs of each complainant, show a trust or authority relationship. That assertion is an overreach of the facts of this situation. A number of the complainants had modelled before, most volunteered that they would be interested in lingerie/swimwear photography, and there is no evidence that they were pressured to take any type of photograph they were not otherwise willing to do. There is no evidence Mr. Dow held any position of authority that would cause the complainants to be dependent upon Mr. Dow in whole or in part.

[17] I also caution that there is no evidence that Mr. Dow's business was merely a ruse or front to lure in victims who could then be relatively freely assaulted. I have no doubt that his business was a legitimate business and all of the photographs he took were for a business purpose. Yet, operating under low moral standards, he took advantage of perceived opportunities with some of his clients but not others. His perception was warped and it was wrong to do so.

[18] Turning to mitigating factors, I note:

- critically, the offences are relatively minor on the scale of sexual assaults. For the most part, they were isolated single instances of touching that lasted a matter of seconds or several moments and, except for JD, Mr. Dow stopped the touching on his own accord and did not repeat it;
- none of the offences involved digital, genital, or oral penetration or violence or the threat of violence;
- Mr. Dow does not have a criminal record and therefore is not disentitled to a degree of leniency;
- the last offence was May 2005, over seven years ago; and
- according to the psychologist's report, he is a low risk to re-offend.

[19] I also note that as natural consequences of these offences, Mr. Dow has lost his employment as a police officer and has been publicly shamed. Additionally, he has been financially ruined.

[20] Two other points. First, Mr. Dow's guilty pleas demonstrate acceptance of responsibility for what he did. The timing of the pleas, however, on the eve of trial, tempers somewhat the mitigating effect of the pleas as the complainants all went through the preliminary inquiry and prepared to testify at the trial. Yet given the nature of this and another criminal proceeding for which he was acquitted, the late guilty pleas are understandable. Indeed it would have been remarkable if a plea arrangement could have been reached earlier. Second, there is a final factor that should be taken into account, specifically the delay in sentencing. The last offence was in May 2005, over seven years ago, and the charges are about six years old. As noted, for the most part, I do not attribute this delay as being caused by Mr. Dow. The delay should be factored in the sentence, but minimally, to recognize the extended toll and stress upon Mr. Dow.

Range of Sentence

[21] Given these factors, what is the appropriate range of sentence for Mr. Dow?

[22] As noted, few precedents were of assistance as most of the cases with which I was provided dealt with dissimilar situations or articulated certain sentencing principles that should be considered and inform the appropriate range. Three cases warrant mentioning. In ***R. v. Gavrilko***, 2007 BCSC 1473, 75 W.C.B. (2d) 646, despite being a breach of trust situation, the court imposed a 12-month CSO upon a dentist who sexually assaulted four patients by touching their breasts a total of about 19 times. In ***R. v. Chrispen***, 2009 SKCA 63, 331

Sask.R. 212, the Saskatchewan Court of Appeal noted the trial judge's assessment of an appropriate range of sentence, based on other precedents, for sexually assaulting one or a few complainants in a manner similar to the facts of this case, was a CSO of three to 12 months. In ***R. v. Rurak***, 2007 ABPC 131, 418 A.R. 373, the trial judge imposed a sentence of two years' incarceration for two incidents of sexual assault involving touching of breasts where the accused had 16 prior similar offences. Notably, however, Mr. Rurak had previously received, for his first convictions, a two-year sentence of incarceration for seven other similar types of sexual assaults.

[23] Considering all the factors that I must, and for the purpose of a preliminary assessment to see if a CSO is in the range, I find the range of sentence for a person with no prior convictions for offences of this nature is a period of incarceration of no more than two years less a day. Implicit in this, is that probation is *prima facie* outside of an appropriate range and a CSO is an available sentencing option.

[24] There is simply no basis for the Crown's position that a five-year penitentiary term is a just sentence on these facts and circumstances. It would be an exceedingly harsh sentence, indeed possibly vengeful. Denunciation and retribution are proper considerations but vengeance is not. As noted in ***R. v. C.A.M.***, [1996] 1 S.C.R. 500, S.C.J. No. 28 (QL):

> 79. Retribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. In my view, retribution is integrally woven into the existing

principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be "just and appropriate" under the circumstances...

80. However, the meaning of retribution is deserving of some clarification. The legitimacy of retribution as a principle of sentencing has often been questioned as a result of its unfortunate association with "vengeance" in common parlance.... As both academic and judicial commentators have noted, vengeance has no role to play in a civilized system of sentencing...Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more. As R. Cross has noted in *The English Sentencing System* (2nd ed. 1975), at p. 121: "The retributivist insists that the punishment must not be disproportionate to the offender's deserts."

81. Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass". The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*.

(emphasis added)

CSO or Jail

[25] To recap, there are number of steps in the analysis as to whether Mr. Dow should be granted a CSO or whether he should serve his sentence in jail. First and second, as noted there is no statutory prohibition against a CSO being imposed in this situation and a CSO is in the range of a fit sentence in these circumstances. In fact, arguably, there is precedent to support a CSO. Third, I am satisfied Mr. Dow does not represent an ongoing threat or a danger to the community, such that serving his sentence in the community would not endanger it.

[26] In considering the next factor, whether a CSO is appropriate or consistent with the fundamental principles of sentencing, I have once again reviewed ***Proulx***, and other decisions where sexual offenders have been granted CSO's. I note the court's comments at paragraph 114:

> Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence. Conversely, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance, depending on the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served.

[27] Under the circumstances here, I view denunciation as the primary sentencing consideration with retribution and general deterrence being the other critical considerations. In this respect, the aggravating factors of the sexual assaults set out earlier in this decision, including that one victim was under 18

years of age and five were between 18 and 19, and the sheer number of complainants, 12, strongly tilts the considerations away from a CSO and in favour of the sentence being served in jail. I also consider Mr. Dow's occupation as a police officer to be a factor, but not a determining or even major factor, contributing to this view, as society is entitled to expect more from guardians of justice. Frankly, despite what might be considered to be parity, or similar sentences with other similar offenders, I cannot fathom that a CSO could properly underscore the condemnation required commensurate with the gravity of this situation and the degree of responsibility of Mr. Dow. I find that a CSO would not appropriately address the fundamental principles of sentencing.

[28] What then is the appropriate sentence? I return to the steps set out by the Manitoba Court of Appeal in ***P.K.***

The Sentence

[29] The Crown and defence disagree as to whether I should take a concurrent or consecutive approach to the sentence. I agree with the Crown that here it makes most sense to approach the overall sentence on the basis of consecutive sentences for each offence. Aside from the fact the offences all took place in the context of Mr. Dow's fashion/model photography-agent business, they are otherwise clearly not a single transaction and are not what I would consider to be a related or contemporaneous spree of offences such as random "groping" of victims, or lewd acts, by an intoxicated or mentally disturbed individual. The offences are distinct in time and victim, with many other inconsequential

contacts between Mr. Dow and other models or young women during the relevant time frame. What then is the appropriate sentence for each count?

[30] I pause to note that the Crown approached this assessment starting from a global sentence of five years, which they divided by the 12 offences and suggested six months per offence. The defence approached it by categorizing the offences, attributing periods of incarceration to each offence and coincidentally arriving at an aggregate sentence of slightly less than two years (23 months, 20 days), which of course was necessary in order to argue for a CSO. Both approaches suited their particular purposes and I reject them.

[31] Of the sexual assaults, six involved touching the breasts only, two involved touching of the breasts and thighs or buttocks and three involved touching the vagina. The remaining offence of simple assault was for touching the chest. Grouping like offences together, I set a period of 30 days' incarceration for each offence involving touching of breasts, 45 days for each offence of touching inner thighs, buttocks and breasts and 60 days for each offence where Mr. Dow touched a complainant's vagina. In relation to Count 11, the simple assault upon 17-year-old DE, I impose a sentence of 15 days only given the nature of the assault. As well, I double the sentence for Counts 24 and 11 because the victims were 17 years old, and also for Count 3, because of the aggravating factor of Mr. Dow telling the victim's mother she was safe because he was a police officer.

[32] All of the sentences will be consecutive one to the other. In the aggregate, Mr. Dow is sentenced to 540 days, or 18 months' incarceration. From this, I deduct 10% to factor in the excessive delay from arrest to sentencing. Thus the ultimate sentence is 486 days, or approximately 16 months' incarceration.

[33] I caution that although assigning a period of incarceration to each offence, including the first offence Mr. Dow committed, is appropriate considering the aggregate number of offences for which I am sentencing Mr. Dow, a particular sentence on a specific count should not be considered a precedent for another first offender for a single offence or perhaps even several offences. In other words, other dispositions such as a discharge, fine, suspended sentence, or probation, might well be within the range of a just and appropriate sentence, but for the fact that I am dealing with 12 individual offences. Conversely, a particular sentence I impose here may be inappropriately low as a precedent for an offender with previous criminal convictions, unlike Mr. Dow.

[34] Finally, having made this determination, I now take a last look at the total cumulative length of the sentence with a view to determining whether the total sentence is so high as to be a "crushing punishment" on Mr. Dow. In my assessment, it is not. It is near the position of the defence and well below the position of the Crown. It is a provincial correctional sentence, not a penitentiary sentence. It is not a soft sentence considering the stark nature of jail for a

58-year old man who has never been there before, but neither is it unduly harsh. It takes into account factors of denunciation and deterrence and, frankly, the distinct concept of punishment or retribution reflecting the moral blameworthiness of Mr. Dow. It is a just and appropriate sentence, but nothing more (***R. v. C.A.M.***, *supra*). Overall, it is proportionate and provides a clear line of sight for Mr. Dow to emerge from this dark hole.

[35] Finally, I have also considered whether a term of probation ought to be added to the sentence, but do not see this as necessary or beneficial.

V. CONCLUSION

[36] In respect of:

- Counts 10, 24, 3, and 27, touching of breasts, Mr. Dow is sentenced to 30 days on each count;
- Counts 13 and 19, touching one of or all of the inner thighs, buttocks and breasts, Mr. Dow is sentenced to 45 days on each count;
- Counts 20, 22 and 26, touching of the vagina, Mr. Dow is sentenced to 60 days on each count;
- Counts 4 and 6, touching of breasts with aggravating factors, Mr. Dow is sentenced to 60 days on each count; and
- Count 11, Mr. Dow is sentenced to 30 days.

All sentences are consecutive one to the other. From the aggregate sentence of 540 days, 54 days shall be deducted in consideration of the delay in this case,

leaving Mr. Dow with a go forward sentence of 486 days, or approximately 16 months.

[37] Mr. Dow will:

a) comply with SOIRA registration for 10 years;

b) provide a sample of his DNA to authorities within 14 days as the sexual assaults are primary designated offences under the ***Code.***

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Martin J.